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TRIAL BY JURY AND THE REFORM OF CIVIL PROCEDURE

IN these days when the demand for a more efficient administration of justice is finding a response as never before in the ranks of the legal profession, when a sympathetic and scientific attempt is being made to simplify procedure in the courts of the several states and of the United States, it is important to consider how far the path is blocked by the provisions in the state and federal constitutions guaranteeing the right to trial by jury.[1] Are these provisions a real obstacle in the path of reform? The answer depends on what is meant by trial by jury.

Perhaps the most striking phenomenon in the history of our procedural law is the gradual evolution of the institution of trial by jury. The jury as we know it today is very different from the Frankish and Norman inquisition, out of which our modern jury has been slowly evolved through the centuries of its "great and strange career."[2] It is different from the assizes of Henry II., that great reformer of procedural law. It is different from the

[1] It is not the purpose of the writer to discuss the right to trial by jury in criminal actions, nor to consider to what kinds of civil actions the constitutional guaranty extends. Nor will any attempt be here made to discuss the much mooted question of the value of the institution of trial by jury in civil cases. For a discussion of this question, see 3 BL. COMM. *379, *385; Second Report of the Common Law Commissioners, 1853; ERLE, THE JURY LAWS; THE FEDERALIST, No. LXXXIII; FORSYTH, HISTORY OF TRIAL BY JURY, chap. 18; Miller, "The System of Trial by Jury," 21 AMER. LAW REV. 859. As to the present English practice, see R. S. C., Order 36, rules 2–9.

[2] THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW, chaps. 2–4.

trial by jury known to Lord Coke and to the early American colonists who carried to a New World the principles of English jurisprudence.[3] "To suppose," says Edmund Burke, "that juries are something innate in the Constitution of Great Britain, that they have jumped, like Minerva, out of the head of Jove in complete armor is a weak fancy, supported neither by precedent nor by reason."[4] In England there has been a wonderfully steady and constant development of trial by jury from the Conquest to the present day. In this country surely it was not, by the adoption of our constitutions, suddenly congealed in the form in which it happened to exist at the moment of their adoption. The procedure of the first half of the seventeenth century or of the second half of the eighteenth century surely was not "fastened upon the American jurisprudence like a strait-jacket, only to be unloosed by constitutional amendment."[5] The common-law practice described so painstakingly by the learned Mr. Tidd surely did not bodily become a part of the organic law of the United States.

The state constitutions usually contain a general provision that "the right to trial by jury shall remain inviolate," or that "the right to trial by jury, as heretofore enjoyed, shall remain inviolate."[6] In the federal and territorial courts the right to trial by jury in civil cases is guaranteed by the Seventh Amendment to the federal constitution which provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reëxamined in any Court of the United States, than according to the rules of the common law." Since the first ten amendments were intended as limitations on the power of the federal government, the Seventh Amendment does not extend to

[3] In the seventeenth century the jurors still were expected to decide on their own knowledge of the facts and not merely upon the evidence. THAYER, EVIDENCE, 170–74.

In the early colonial legislation we see recognition of the function of jurors as witnesses. "It is very requisite that part of the jury, at least, come from [the neighborhood where the fact was committed] who by reason of their near acquaintance with the business may give information of divers circumstances to the rest of the jury." 2 HENING'S VA. STAT. L. 63.

[4] BURKE, WORKS (3 ed.), VII, 115.

[5] See Twining *v.* United States, 211 U. S. 78, 101.

[6] See a collection of the various constitutional provisions in the Report of the Board of Statutory Consolidation, New York, 1912, 56–82; also in THOMPSON, TRIALS (2 ed.), § 2226.

the state courts. It does not require trial by jury in an action brought in the state courts, even though the action is based on a federal statute, and though the statute provides that the action if brought in a state court shall not be removed to a federal court.[7]

Now what is this trial by jury, the right to which was so highly prized by our ancestors as to be put beyond the power of the legislature to abolish? The constitutions do not define it. Its meaning must be ascertained by a resort to history.

Two propositions are fundamental:

First. Whatever was an incident or characteristic of trial by jury in a particular jurisdiction at the time of the adoption of the constitutional guaranty in that jurisdiction is not thereby abolished. In determining what is meant by trial by jury under the Seventh Amendment, inasmuch as the practice was different in the different colonies,[8] the federal courts look to the common law of England rather than to the law of any particular colony; and incidents of trial by jury, known in England at the time of the adoption of the Seventh Amendment, are not done away with by its adoption.[9]

Second. Although the incidents of trial by jury which existed at the time of the adoption of the constitutional guaranty are not thereby abolished, yet those incidents are not necessarily made unalterable. Only those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature. The question of the constitutionality of any particular modification of the law as to trial by jury resolves itself into a question of what requirements are fundamental and what are unessential, a question which is necessarily, in the last analysis, one of degree. The question, it is submitted, should be approached in a spirit of open-mindedness, of readiness to accept any changes which do not impair the fundamentals of trial by jury. It is a question of substance, not of form.[10]

[7] Minn. & St. Louis R. R. Co. *v.* Bombolis, 241 U. S. 211; St. Louis & San Fran. R. R. Co. *v.* Brown, 241 U. S. 223; Ches. & Ohio Ry. *v.* Carnahan, 241 U. S. 241.

[8] THE FEDERALIST, No. LXXXIII; Reinsch, "The English Common Law in the Early American Colonies," 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 367.

[9] Thompson *v.* Utah, 170 U. S. 343, 349; Capital Traction Co. *v.* Hof, 174 U. S. 1; Maxwell *v.* Dow, 176 U. S. 581.

[10] "The Seventh Amendment, indeed, does not attempt to regulate matters of pleading or practice, or to determine in what way issues shall be framed by which questions of fact are to be submitted to a jury. Its aim is not to preserve mere matters

It has, indeed, been contended that no change is admissible unless it can be demonstrated that the change tends necessarily the better to preserve the jury, and that it is not enough that it does not tend necessarily to destroy it.[11] This, it is submitted, is not the proper attitude in which to approach the constitutional question. A great chief justice of Massachusetts, speaking of the provision as to trial by jury in the constitution of that commonwealth, wisely said: "I think we are bound to examine it in no nice, criticising spirit, but to take the broadest and most liberal view of it, with a reverential regard to the great objects and purposes of its founders." [12]

An examination of the conception of trial by jury in our Anglo-American system shows that certain elements have long been regarded as of its essence.

I. *Number of jurors.* The term "jury," it is said, connotes a body of twelve, no more and no less. Learned judges have indeed sometimes permitted themselves to say that Magna Charta guaranteed the right to trial by twelve jurors.[13] But this is of course inaccurate; the right to trial by a jury of twelve or of any other number was not guaranteed by the Great Charter.[14] At the beginning of the thirteenth century twelve was indeed the usual but not the invariable number.[15] But by the middle of the fourteenth century the requirement of twelve had probably become definitely fixed. Indeed this number finally came to be regarded with something like superstitious reverence.[16] It is not strange,

of form and procedure but substance of right. This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative. So long as this substance of right is preserved the procedure by which this result shall be reached is wholly within the discretion of the legislature, and the courts may not set aside any legislative provision in this respect because the form of action — the mere manner in which questions are submitted — is different from that which obtained at the common law." Walker *v.* Southern Pac. R. R., 165 U. S. 593, 596.

[11] Schofield, "New Trials and the Seventh Amendment," 8 ILL. L. REV. 381. See also Hackett, "Right to Direct a Verdict," 24 YALE L. J. 127.

[12] Shaw, C. J., in Comm. *v.* Anthes, 5 Gray (Mass.), 185, 222.

[13] See Thompson *v.* Utah, 170 U. S. 343, 349. See also BAC. ABR., tit. Juries; HAWLES, ENGLISHMAN'S RIGHT, 4.

[14] MCKECHNIE, MAGNA CHARTA (2 ed.), 134–38, 375–82.

[15] THAYER, EVIDENCE, 85.

[16] DUNCOMB, TRIALS PER PAIS (8 ed.), 92; THAYER, EVIDENCE, 85–90. The importance of the number is dwelt upon by Lord Coke, who says: "And it seemeth to me that the law in this case delighteth herself in the number of 12 . . . and that number of twelve is much respected in Holy Writ, as 12 apostles, 12 stones, 12 tribes,

therefore, to find that the very first of our state statutes to be held unconstitutional was a New Jersey statute providing for a jury of six, which, in 1780, was held by the Supreme Court of that state to violate the constitutional provision that "the inestimable right of trial by jury shall remain confirmed as a part of the law of this colony, without repeal forever." [17] This idea that the requirement of twelve persons on the jury is of the essence has been frequently affirmed.[18] But in several states the constitutions have been amended so as to permit of juries of less than twelve.[19]

II. *Unanimity.* And next it is held that a unanimous concurrence by the jurors in the verdict is an essential of trial by jury. There is no such requirement in other systems of law than the Anglo-American system. In early times there was no such requirement in the English law. The judges occasionally took the verdict of eleven, and imprisoned or otherwise punished the obstinate twelfth. But in a case in the fourteenth century such a proceeding was severely condemned, and the court refused to render judgment on the verdict, and ordered that a new jury be summoned, and the imprisoned juror discharged.[20] By the middle of the fourteenth

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etc." Co. LITT. 155 *a*. See also GUIDE TO ENGLISH JURIES, 10; SOMERS, THE SECURITY OF ENGLISHMEN'S LIVES, 94. These works were well known to the American colonists. WARREN, HARVARD LAW SCHOOL, I, 126; JEFFERSON, WORKS, V, 102. By the Duke of York's Laws, 1665, it was provided, however, that "no jury shall exceed the number of seven nor be under six, unless in special cases upon life and death, the justices shall think fit to appoint twelve." But twelve was the number fixed in New York by the Charter of Liberties and Privileges in 1683.

[17] Holmes *v.* Walton, 4 AMER. HIST. REV. 456, WAMBAUGH, CASES ON CONSTITUTIONAL LAW, 21 (S. C.). This case was decided more than ten years before the adoption of the Seventh Amendment to the federal Constitution.

[18] Thompson *v.* Utah, 170 U. S. 343; Collins *v.* State, 88 Ala. 212; Dixon *v.* Richards, 2 How. (Miss.) 771; Foster *v.* Kirby, 31 Mo. 496; Opinion of the Justices, 41 N. H. 550; Lovings *v.* Norfolk etc. Ry. Co., 47 W. Va. 582. But see Froelich *v.* Express Co., 67 N. C. 1, 8. See note in 43 L. R. A. 33.

[19] Arizona (courts not of record), California, Colorado, Georgia, Idaho (by consent of parties), Illinois (before justices of the peace), Iowa (inferior courts), Minnesota, Missouri (courts not of record), Montana (justices' courts or by consent in other courts), Nebraska (courts inferior to district court), Nevada (by consent of parties), New Jersey (if matter in dispute does not exceed $50), New Mexico (courts inferior to district court). North Dakota (courts not of record), Oklahoma (county courts and courts not of record), South Dakota (courts not of record), Utah (8 in courts of general jurisdiction, 4 in courts of inferior jurisdiction), Virginia (circuit and corporation courts), Washington (courts not of record), West Virginia (justices of the peace), Wyoming.

[20] Y. B. 41 EDW. III, 31, 36; HALE, PLEAS OF THE CROWN, II, 297; THAYER, EVI-

century the requirement of unanimity seems to have become definitely established. The orthodox method of procuring unanimity was to starve and freeze and jolt the jurors until they were all of one mind;[21] and finally this gave way to the modern and more amiable substitute of simply tiring them into concurrence. Long before the adoption of our constitutions the requirement of unanimity was regarded as fundamental.[22] It is not unnatural, therefore, that the courts should hold that under a constitution guaranteeing the right to trial by jury it is not competent for the legislature to dispense with the requirement of unanimity.[23] In an increasing number of states, however, the constitutions expressly provide for a verdict by less than the whole number of jurors in civil cases.[24]

III. *Impartiality and competence.* There is another fundamental requirement which is clearly of the essence of trial by jury; the jury must be so selected and so constituted as to be an impartial and fairly competent tribunal. Any action, legislative, executive, or judicial, which excludes from the jury all members of a class,

DENCE, 88. Originally in the assizes established by Henry II, if the twelve first summoned were ignorant of the fact, they were rejected and others summoned in their place. If the twelve did not agree, others were added to the jury until twelve did agree. This process was called afforcement of the jury. GLANVILL, Bk. II, chaps. 17, 18; FORSYTH, TRIAL BY JURY, 238; THAYER, EVIDENCE, 62.

[21] By a New Jersey statute it was expressly provided that the jury "shall be kept together in some convenient private place without meat, drink, fire or lodging until they all agree upon a verdict." ALLINSON'S LAWS, 470. See also 1 HENING'S VA. STAT. L. 303 (1645); 2 *Ibid.*, 73 (1661–62).

[22] HALE, HISTORY OF THE COMMON LAW (4 ed.), 293; THAYER, EVIDENCE, 86.

[23] American Publishing Co. *v.* Fisher, 166 U. S. 464; Springville *v.* Thomas, 166 U. S. 707; Opinion of the Justices, 41 N. H. 550. See 24 L. R. A. 272. On the policy of requiring unanimity in civil actions, see WILSON, WORKS (Andrews' ed.), II, 162–210; FORSYTH, TRIAL BY JURY, chap. 11; CLARKE, UNANIMITY IN TRIAL BY JURY; LONGLEY, OBSERVATIONS ON TRIAL BY JURY; Miller, "The System of Trial by Jury," 21 AMER. L. REV. 859, 862; Third Report of Commissioners on Courts of Common Law, 1831, 69–70 (advising that if no unanimous agreement is reached after twelve hours of deliberation a verdict concurred in by nine should be good).

It would have been possible of course to take a broader view of the constitutional requirement. James Wilson, judge and professor of law, in his lectures on law said: "When I speak of juries, I feel no particular predilection for the number twelve. . . . I see no peculiar reasons for confining my view to a unanimous verdict, unless that verdict be a conviction of a crime. . . . When I speak of juries, I mean a convenient number of citizens, selected and impartial, who, on particular occasions, or in particular causes, are vested with discretionary powers to try the truth of facts." WILSON, WORKS (Andrews' ed.), II, 162.

[24] Arizona, California, Idaho, Minnesota, Mississippi, Missouri, Montana, Nevada, New Mexico, Ohio, South Dakota, Utah, Washington.

deprives a member of that class of the right to trial by jury;[25] indeed, it deprives him of the equal protection of the laws, and of life, liberty, or property without due process of law.[26] So also any other provision which is calculated to allow prejudiced or biased persons to serve on the jury is a violation of the right to trial by jury. But where the interest of a juror is remote or problematical, although sufficient to constitute a ground of exclusion at common law, it is competent for the legislature to allow him to serve. Thus a statute is constitutional which allows an inhabitant or taxpayer of a town or city to be a juror, although the town or city is a party, and the inhabitant or taxpayer may thus be remotely interested in the result.[27] A statute which provides that the mere formation or expression of an opinion shall not necessarily be a ground of exclusion is not unconstitutional;[28] nor a statute providing for struck juries,[29] nor a statute changing the number of peremptory challenges allowable,[30] or the number of the jury panel,[31] or the mode of selecting jurors, provided the method is fair.[32]

IV. *Province of the jury.* Trial by jury, then, involves a unanimous determination by twelve disinterested and reasonably competent persons. A determination of what? Of such matters only as are properly within the province of the jury. The jury after all has only a limited and special *rôle*. The court also has a part to play.[33] Where, under our constitutions, is to be drawn the line which separates the province of the jury from that of the court? The guiding principle has indeed been laid down at least since the time of Lord Coke. *Ad quaestionem facti non respondent judices, ad quaestionem juris non respondent juratores.*[34] But the limits of this principle have never been exactly fixed; indeed, they have varied from time to time.

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[25] Gibbs *v.* State, 3 Heisk. (Tenn.) 72.

[26] Dennis, "Jury Trial and the Federal Constitution," 6 COL. L. REV. 423.

[27] Comm. *v.* Worcester, 3 Pick. (Mass.) 462.

[28] Stokes *v.* People, 53 N. Y. 164.

[29] Lommen *v.* Minneapolis Gaslight Co., 65 Minn. 196.

[30] Walter *v.* People, 32 N. Y. 147.

[31] Conyers *v.* Graham, 81 Ga. 615.

[32] People *v.* Harding, 53 Mich. 48; Dowling *v.* State, 5 Sm. & M. (Miss.) 664; State *v.* Slover, 134 Mo. 607; People *v.* Meyer, 162 N. Y. 357.

[33] See Capital Traction Co. *v.* Hof, 174 U. S. 1; Opinion of the Justices, 207 Mass. 606.

[34] Co. LITT. 155 *b*; THAYER, EVIDENCE, 185.

At the time when the first permanent settlements were being established in America there was a great deal of popular enthusiasm in England for trial by jury. This enthusiasm was based chiefly on the value of the institution as a bulwark of liberty, as a means of preventing oppression by the Crown. The Stuart judges were exceeding the bounds of decency in their attempts to coerce juries, and the tide of popular resentment ran strong. There was a rapid fire of eloquent encomiums and panegyrics — I refer to such popular treatises as "The Englishman's Right," "The Guide to English Juries," "The Security of Englishmen's Lives" — which were received with acclaim by the people in England and which soon found their way across the Atlantic.[35] At the time of the English Revolution this feeling was at its height. Since the jury was regarded as a protection against the despotic power of the Crown, popular writers naturally contended that the widest powers belonged to the jury; that they were the sole judges of the law and of the facts; that although the judges might advise them as to the law, yet they had not merely the power but the right to determine for themselves whether the judges' view of the law was correct or not. This doctrine found its most emphatic expression, of course, in criminal suits. In the trial of Colonel Lilburne for treason, in 1649, the doughty defendant uttered a challenge which delighted his fellow countrymen, when he said: "The jury by law are not only judges of fact but of law also, and you who call yourselves judges of the law are no more but Norman intruders, and indeed and in truth, if the jury please, are no more but cyphers to pronounce their verdict." Mr. Justice Jermin in wrathful defense of the bench, replied: "Was there ever such a damnable blasphemous heresy as this is, to call the judges of the law cyphers?" [36] And even in civil cases the same view found wide popular support. In that popular treatise, "The Security of Englishmen's Lives," Lord Somers said:[37] "As it hath been the law, so it hath always been the custom and practice of these juries, upon all general issues, pleaded in cases civil as well as criminal, to judge both of the law and fact."

[35] The first-named book was reprinted in America in 1693; the third-named, in 1720. WARREN, HARVARD LAW SCHOOL, I, 126.

[36] VARAX, TRIAL OF COLONEL LILBURNE (2 ed.), 107; 4 How. St. Tr. 1270, 1379.

[37] Page 95.

Shortly after the English Revolution however a change took place. The direct power of the Crown over the judges ceased when in 1700, by the Act of Settlement,[38] it was provided that they should hold office no longer at the pleasure of the Crown but for life or good behavior. The confidence of the people in the judges increased, and there was a corresponding diminution in the extravagant enthusiasm for wide power in the jury. Burke, that sturdy upholder of liberty, says: "What does a juror say to a judge, when he refuses his opinion upon a question of judicature? 'You are so corrupt, that I should consider myself a partaker of your crime, were I to be guided by your opinion'; or, 'You are so grossly ignorant, that I, fresh from my hounds, from my plough, my counter, or my loom, am fit to direct you in your own profession.' This is an unfitting, it is a dangerous state of things." [39] It may safely be said that at the time of the American Revolution the general principle was well established in the English law that "juries must answer to questions of fact and judges to questions of law. This is the fundamental maxim acknowledged by the constitution." [40] But, as we shall see, the inadequacy of the methods of keeping the jury within their proper sphere gave rise to certain difficulties.

In the American colonies during the eighteenth century there was a gradually increasing popular enthusiasm for trial by jury and a popular desire strictly to limit the powers of the judges and to give the jury great latitude. The Crown judges were generally and increasingly unpopular. Often, too, they were incompetent; sometimes they were laymen, ignorant of the principles of the law. It was generally contended that even in civil cases the jury had the right as well as the power to decide questions of law as well as of fact.[41] But this extreme view, which was largely the result

[38] 12 & 13 WILL. III, c. 2.

[39] BURKE, WORKS (3 ed.), VII, 119.

[40] WYNNE, EUNOMUS, Dialogue III, § 53. See FORSYTH, TRIAL BY JURY, chap. 12. See especially Hargrave's note to Co. LITT. 155 *b*. The question of the right of the jury to bring in a general verdict in criminal libel cases gave rise in the latter part of the eighteenth century to a renewal of the controversy as to the respective functions of court and jury. See Woodfall's Case, 20 How. St. Tr. 895; King v. Dean of St. Asaph, 3 T. R. 428, note; BURKE, WORKS (3 ed.), VII, 105–27; FORSYTH, TRIAL BY JURY, 267–82; WORTHINGTON, POWER OF JURIES. There are provisions as to this in many of the state constitutions. See 33 L. R. A. (N. S.) 207.

[41] See a learned note in Quincy's Mass. Rep. 556–72. See also JEFFERSON, WORKS, III, 235; *Ibid.*, V, 102; WILSON, WORKS (Andrews' ed.), II, 214–24; SWIFT, SYSTEM OF LAWS, II, 259.

of a temporary reaction against usurpations by corrupt or incompetent or at any rate unpopular judges, did not by the adoption of the constitutional guaranty of trial by jury become a part of our organic law.[42] No, as we shall see, our courts have recognized the broad principle that the constitutional province of the jury in civil cases is simply the determination of questions of fact in issue as to which reasonable men may reach different results; that the constitutional guaranty is not violated by the exercise of control by the court either (1) in keeping the jury to the determination of questions of fact, or (2) in keeping it within the bounds of reason in determining questions of fact.[43] It is true that at common law it sometimes has the right or at least the power to do more than this. That is due, as we shall see, to certain defects in the machinery whereby the jury is confined to the exercise of its special office.

What, then, are the methods of controlling the jury? At the outset one is struck by the fact that there is no simple, systematic, adequate method. The methods of controlling the jury grew up in a haphazard sort of way. Most of them grew up at a time when the jurors still had a right to decide upon their own knowledge, as well as upon the evidence, a right which in the eighteenth century became obsolete.[44]

A. *Questions arising on the pleadings.* The concurrence of the jury is not always necessary for the rendition of a judgment in an action at law. No question is presented for the consideration of the jury unless the parties have reached an issue of fact.[45] If

[42] Sparf *v.* United States, 156 U. S. 51; Comm. *v.* Anthes, 5 Gray (Mass.), 185; THOMPSON, TRIALS (2 ed.), §§ 940–51, 2132–49. In the constitution of Georgia of 1777 (§ XLI), however, it was expressly provided that "the jury shall be judges of law, as well as of fact, and shall not be allowed to bring in a special verdict."

[43] THAYER, EVIDENCE, 208.

[44] 3 BL. COMM. *374.

[45] See Willion *v.* Berkley, 1 Plowd. 223, 230. In the case of a default or of a demurrer if the damages are unliquidated a question of fact as to the amount of damages will arise. Must this be submitted to a jury? At common law damages in such cases would usually be ascertained by a jury summoned on a writ of inquiry and presided over by the sheriff, but that jury was not necessarily composed of twelve persons (DUNCOMB, TRIALS PER PAIS (8 ed.), 93; Co. LITT. 155 *a*, Hargrave's note); or the court might determine the question of the amount of damages without reference to any jury. SELLON, PRACTICE (1 Am. ed.), 347. It has been held, therefore, in some cases that the constitutional right to trial by jury does not extend to the question of the *quantum* of damages on default or demurrer. Raymond *v.* Danbury & Norwalk

the pleadings terminate in a demurrer, an issue of law only is raised, and that issue is for the determination of the court. This is the case when the pleading demurred to does not state facts which constitute a cause of action or a defense, or when it discloses an affirmative defense, or when having stated sufficient facts to constitute a cause of action or defense, it then unnecessarily states evidence of those facts, which evidence is insufficient to sustain them.[46] At common law by the use of special pleading, by spreading the facts on the record, a case could sometimes be kept from the jury. This was indeed the great purpose of the special traverse. Instead of simply denying directly, the pleader would allege facts constituting an argumentative denial, and add a direct denial. The purpose was to invite a demurrer, in order that the question, whether the facts alleged in the argumentative denial were sufficient as a matter of law to meet the other's case, might be raised on the pleadings and determined by the court, instead of being raised at the trial, where the jury might or might not follow the instructions of the judge on the law.[47] So also the purpose of the substitution of a plea by way of confession and avoidance for the general issue by the strange method of making an admission of a "colorable" right in the plaintiff, was to get the facts on the record in order to avoid a jury trial.[48] One of the principal ends aimed at by the common-law commissioners in 1830 in advocating the limitation of the general issue and the extension of special pleading was the severance on the record of the law from the facts.[49] All these things which were incidental to trial by jury at common law are not, of course, forbidden by our constitutions. The law has greatly varied from time to time as to just how much should or may properly be stated in the pleadings. Surely the legislature can constitutionally regulate the rules of pleading so as to require matters to be stated on the record which at common law did not have to be so stated and thus, more fully than at common law, separate on the record questions of law

R. R. Co., Fed. Cas. 11593, 14 Blatchf. 133, 43 Conn. 596; Hopkins *v.* Ladd, 35 Ill. 178. But see Central, etc. R. R. Co. *v.* Morris, 68 Tex. 49. See 20 L. R. A. (N. S.) 1.

[46] First Nat. Bank *v.* St. Croix Boom Corp., 41 Minn. 141.

[47] STEPHEN, PLEADING, *205.

[48] Leyfield's Case, 10 Rep. 88; STEPHEN, PLEADING, *233; THAYER, EVIDENCE, 232; JENKS, SHORT HISTORY OF ENGLISH LAW, 163.

[49] Second Report, 46.

from questions of fact, — just as indeed it may go to the other extreme and provide that the legal elements constituting a cause of action need not be stated, but only such a description of the cause of action as will give to the opposite party notice of the nature of the claim against him.[50]

B. *Questions not arising on the pleadings.* When questions of law are not separated on the record from questions of fact, it is a more difficult task to keep separate the respective functions of court and jury. If the pleadings terminate in an issue of fact, various questions of law as well as of fact may arise at the trial. How then may the court confine the jury to its special office?

1. *Instructions to the jury.* The duty of the trial judge is not merely to preside at the trial, to keep order, to determine questions on the admissibility of evidence: it is his duty also to instruct the jury. As far back as the Year Books go we find the court delivering a charge to the jury. The difficulty with this method of controlling the jury is of course that when the facts are doubtful there may be no way of determining whether or not the jury has followed the instructions of the judge on the law. At common law it was clearly proper for the judge not merely to state the law and to sum up the evidence, but also to express an opinion on the questions of fact in issue as long as he leaves to the jury the ultimate determination of the issue, and makes it clear that it is not bound to adopt his opinion as its own. Since the judge had this power at common law, he is not deprived of it merely because the right to trial by jury is guaranteed by the constitution.[51] But in many of the states this power has been expressly taken away by constitutional or statutory provisions.[52] It may well be questioned

[50] The present system of pleading whereby questions of law are supposed to be separated from questions of fact, too often resulted in earlier days in technical decisions, and today, when amendments and pleading over are freely allowed, in delay. The substitution of a system of notice pleading has been urged by Dean Pound in place of the present system. Pound, "Some Principles of Procedural Reform," 4 ILL. L. REV. 388, 491, at pages 494–97. See also Whittier, "Notice Pleading," 31 HARV. L. REV. 501. If there are really effective means of keeping the jury within their province as to questions not arising on the pleadings, the desirability of raising questions of law on the pleadings is greatly diminished.

[51] Vicksburg, etc. R. R. Co. *v.* Putnam, 118 U. S. 545; United States *v.* Reading R. R., 123 U. S. 113; Lovejoy *v.* United States, 128 U. S. 171; Simmons *v.* United States, 142 U. S. 148.

[52] Sunderland, "The Inefficiency of the American Jury," 13 MICH. L. REV. 302.

how far the legislature can constitutionally curtail in this way the power of the judge. "Trial by jury, in such a form as that, is not trial by jury in any historic sense of the words. It is not the venerated institution which attracted the praise of Blackstone and of our ancestors, but something novel, modern, and much less to be respected." [53]

2. *The attaint and motion for a new trial.* If a verdict has been rendered by a jury on a material issue of fact, can it be overturned? From the beginning of the thirteenth century at least, and in theory, though not in practice, until the nineteenth century, if the verdict was against the evidence or rather false in fact, it could be set aside by attaint. A new and greater jury could be summoned to examine into the issue tried by the jury, and if it found that the verdict was false, the verdict would be reversed, and the original jury severely punished.[54] Since at that period the jurors might decide on their own knowledge as well as on the evidence, their verdict would not be reversed if supported either by the evidence or by facts not in evidence. This uncouth and barbarous method of controlling the jury was in use in this country in colonial times,[55] and indeed it became so frequent in Massachusetts that a statute had to be passed to prevent its abuse.[56] But gradually both in England and in the American colonies as the idea gained ground that the jurors are to decide merely on the evidence and not on facts known to them, it became obsolete, and a new method of controlling the jury became necessary. In 1665 the first reported decision was rendered holding that the court might order a new trial on the ground that the verdict was against the evidence.[57] This did not necessarily mean that the jurors intentionally went wrong, and did not involve a punishment for them. The granting of new trials on the ground that the verdict was against the evidence or on the ground that the damages awarded were excessive or inadequate soon came into common use in England. In the American colonies new trials were not very frequently granted on these grounds, but they were not unknown.[58] Of course this

[53] THAYER, EVIDENCE, 188, note.

[54] "An attaint, the greatest punishment they know on this side death." GUIDE TO ENGLISH JURIES, 4.

[55] Quincy's Mass. Rep. 559; R. I. Col. Rep. (1647) 200.

[56] 5 Mass. Col. Rec. 449.

[57] Wood *v.* Gunston, Style 466.

[58] Quincy's Mass. Rep. 84. Compare the old New England and Georgia practices

practice is not unconstitutional. Indeed, it has been held on the contrary that a statute denying the court the right to grant a new trial is unconstitutional.[59] In England the motion was made before the full court in which the case was pending; and no appeal was allowed from its decision until the Common Law Procedure Act of 1854.[60] In this country the courts have upheld the power of the appellate court as well as of the trial court to order a new trial on the ground that the verdict is against the evidence or that the damages are excessive or inadequate.[61] In some of the cases the question whether such practice is a violation of the constitutional right to trial by jury was expressly considered and answered in the negative.[62] The objection to this method of controlling the jury is the delay and expense involved.

At common law if a new trial was ordered, it had to be a new trial as to all the parties and on all the issues. But there is no reason for re-trying the issues as to one party because of an error affecting only another party, or for re-trying one issue because of an error affecting only another issue. Statutes have accordingly provided in some jurisdictions that the new trial shall be confined to the parties as to whom or the issues as to which the verdict is set aside. Such statutes are constitutional.[63] Each issue as to

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whereby the losing party was entitled to a new trial as a matter of right. 63 U. of PA. L. REV. 592, note. See also United States *v.* 1363 Bags, 2 Sprague, 85; Bartholomew *v.* Clark, 1 Conn. 472.

[59] Capital Traction Co. *v.* Hof, 174 U. S. 1; Opinion of the Justices, 207 Mass. 606. See Bright *v.* Eynon, 1 Burr. 390 ("Trials by jury, in civil causes, could not subsist now without a power, somewhere, to grant new trials." *Per* Lord Mansfield, 393). See also 3 BL. COMM. *390.

[60] Section 35. The motion is now made in the Court of Appeal. R. S. C., Order 39, rule 1.

[61] In a few jurisdictions, however, the rule is otherwise. Southern Ry. Co. *v.* Bennett, 233 U. S. 80. See Riddell, "New Trials in Present Practice," 27 YALE L. J. 353, 361. In Metropolitan R. R. Co. *v.* Moore, 121 U. S. 558, 573, Mr. Justice Matthews, in speaking of the practice of reviewing in an appellate court the action of the trial court in refusing to grant a new trial on the ground that the verdict was against the weight of evidence, said: "Such a practice in the appellate courts of the United States is perhaps forbidden by the Seventh Amendment." But this casual doubt seems not well founded.

[62] Devine *v.* St. Louis, 257 Mo. 470, 51 L. R. A. (N. S.) 860.

[63] Norfolk So. R. R. *v.* Ferebee, 238 U. S. 269; Sparrow *v.* Bromage, 83 Conn. 27; Opinion of the Justices, 207 Mass. 606; Simmons *v.* Fish, 210 Mass. 563; Lisbon *v.* Lyman, 49 N. H. 553 ("The general principle of the correction of errors which occur in judicial proceedings, preserves, as far as possible, what is good, and destroys only

each party is determined by a jury; it is not necessary that all the issues should be determined by the same jury.

If a verdict is excessive and the plaintiff is willing to remit the excess and take what the court regards as a fair sum, the court may refuse to grant a new trial. The defendant cannot successfully claim that he has been denied the right to trial by jury.[64] But the court cannot make the plaintiff take less than the amount which the jury has fixed unless there is a liquidated maximum; the plaintiff may insist on taking the sum fixed by the jury or having a new jury fix the amount.[65]

3. *Demurrer to evidence.* As early as the fifteenth century, this method of withdrawing the case from the jury was employed.[66] After the party having the burden of proof, the proponent, as Professor Wigmore calls him, had introduced all his evidence, the opposing party might demur thereto. If in his demurrer he admitted the truth of the evidence offered by his adversary, the latter was compelled to join in the demurrer. It was not until 1793 that it was held that if the evidence is circumstantial, the demurrant must admit the facts which that evidence tends to prove.[67] The jury who had heard the evidence might be asked to find the amount of damages, but all other questions were withdrawn from them. The difficulty with a demurrer to evidence is that it was a two-edged sword; for if the court held that the jury could have found for the proponent judgment would be given for him, whether the court were of the opinion that the jury would have so found or not;[68] and the demurrant waived his right to put in his own evidence or to have a jury decide the issue.[69] It is clear that the constitutional provision as to trial by jury does not preclude

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what is erroneous when the latter can be severed from the former." *Per* Doe, C. J., 583). *Cf.* Robinson *v.* Smith, [1915] 1 K. B. 711.

[64] Gila Valley, etc. Ry. Co. *v.* Hall, 232 U. S. 94; Detzur *v.* B. Stroh Brewing Co., 119 Mich. 282; Trow *v.* Village of White Bear, 78 Minn. 432; 39 L. R. A. (N. S.) 1064; Ann. Cas. 1912, C 504. Similarly the defendant may prevent a new trial on the ground that the damages are inadequate by consenting to the entry of a judgment for an adequate amount. Carr *v.* Miner, 42 Ill. 179.

[65] Atchison, etc. Ry. Co. *v.* Cogswell, 23 Okla. 181. See Kennon *v.* Gilmer, 131 U. S. 22.

[66] THAYER, EVIDENCE, 234.

[67] Gibson *v.* Hunter, 2 H. Bl. 187; THAYER, EVIDENCE, 235.

[68] Cocksedge *v.* Fanshaw, Doug. 119, 129; Southern Ry. Co. *v.* Tyree, 114 Va. 318.

[69] Galveston, etc. Ry. Co. *v.* Templeton, 87 Texas, 42.

a demurrer to evidence.[70] It is a practice long antedating the adoption of our constitutions; and it does not deprive the jury of their proper function.

4. *The special verdict.* At common law if the jurors wished to bring in a general verdict they could do so. They ran a risk in so doing, inasmuch as, if the verdict was wrong, they might be attainted, whether they went wrong on the facts or on the law.[71] And it was a question whether the fact that they had followed the directions of the judge on the law constituted a defense. But it was manifestly unfair to the jurors to subject them to the severe punishment of attaint because of a mistake of law, and therefore they were allowed to bring in a special verdict finding the facts in issue and leaving to the court the determination of the legal effect of those facts. In the American colonies the special verdict was well known.[72] The judge could not refuse to accept a special verdict if it was good and pertinent to the issue.[73] The objection to special verdicts is the technical nicety with which they must be framed. The court cannot take the place of the jury in finding any of the facts in issue necessary to the foundation of the judgment.[74] If the jury finds merely evidence of the facts in issue, the court has not power to draw inferences as to the facts themselves. But if the jury finds facts sufficient to enable the court to enter judgment, but also draws a general conclusion based on an erroneous view of the law, the court may give judgment upon the facts as found and disregard the conclusion of the jury.[75] Not infrequently the judges attempted to compel the jurors to bring in special verdicts, but the jurors fought stoutly against such

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[70] Hopkins *v.* Railroad, 96 Tenn. 409, and cases cited.

[71] Co. Litt. 228 *a*. "Although the jury if they will take upon them (as Littleton here saith) the knowledge of the law, may give a general verdict, yet it is dangerous for them so to do, for if they do mistake the law, they run into the danger of an attaint; therefore to find the special matter is the safest way where the case is doubtful."

[72] Conn. Rev. Stat., 1672, 37; 3 Mass. Col. Rec. 425; New Jersey Statute of April 23, 1724; New York, Duke of York's Laws, 1665–75. It is said that special verdicts were uncommon in the early history of New England. Lechford, Plain Dealing, 66. See 3 Mass. Col. Rec. 425. In Georgia special verdicts were expressly forbidden by the constitution of 1777, § XLI.

[73] Co. Litt. 228 *a*; Complete Juryman, 246.

[74] Complete Juryman, 247.

[75] Foster *v.* Jackson, Hob. 52 *a*; Priddle & Napper's Case, 11 Co. Rep. 8 *a*, 10 *b*; Complete Juryman, 252.

attempts on the part of the judges and in the end were successful. By statute in many of the states today, however, the court may compel the jury to bring in a special verdict. And in many jurisdictions the court may compel the jury to make special findings of fact in addition to its general verdict; and if those special findings are inconsistent with the general verdict, the court may disregard the general verdict and enter judgment for the opposite party, and need not order a new trial.[76] Such statutes are constitutional. And yet they decidedly change the common-law rule. They take away from the jury the power to take the law into its own hands by rendering a general verdict on the combined law and facts involved in the issue. They remove the chief prop of the old popular idea that the jury has the right to determine the law.

5. *The special case and reserved point.* Again, the jury might give a general verdict for one party, subject to the opinion of the court *in banc* on a question of law involved, stated in a special case or in a point reserved, drawn up by or under the supervision of the judge.[77] If there was any difference of opinion as to the facts proved, the opinion of the jury was taken and the facts stated in accordance with its opinion. It would seem that the consent of the jury was necessary to this proceeding in the absence of the consent of both parties.[78] If the question was resolved in favor of the party for whom the general verdict was given, judgment would be entered on the verdict for him. If the law was found to be the other way, the verdict would be changed accordingly, and verdict and judgment would be given for the opposite party. If it was so defectively stated that no judgment could be given on it, the court would order a new trial.[79] This practice differed from the special verdict in that the question of law did not appear on the record, and therefore the question could not be carried by writ of error to a higher court,[80] whereas a special verdict was entered on the record, and the question of law could be carried up to the

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[76] Walker *v.* New Mexico, etc. R. R. Co., 165 U. S. 593.

[77] SMITH, ACTION AT LAW (2 ed.), 113, 129; STEPHEN, PLEADING, *101. See Dublin, etc. Ry. Co. *v.* Slattery, 3 App. Cas. 1155, 1204–05.

[78] Mead *v.* Robinson, Barnes' Notes (3 ed.), 451; 3 BL. COMM. *378.

[79] TIDD, PRACTICE, II, 597.

[80] This was changed by the Common Law Procedure Act, 1854, §§ 32, 34.

higher court on a writ of error. This practice probably goes back to the seventeenth century;[81] it became very common during the eighteenth century.[82] It is therefore clearly constitutional.[83]

6. *Direction of verdict.* When on the evidence there is no question of fact as to which reasonable men might differ, the courts have had no difficulty in saying that the direction of a verdict does not violate the constitutional provision for trial by jury.[84] This method of withdrawing the case from the jury is different from a demurrer to evidence. The motion is quite informal and is usually oral. If the motion is denied, the moving party is not precluded from putting in his own evidence and from submitting the issues to the jury. Its operation is also different. On a demurrer to evidence the jury is not called upon to take any further part in the trial unless to determine hypothetically the *quantum* of damages. In the case of a directed verdict the jury is called upon to render the verdict. But the jury has no discretion in the matter. The direction of a verdict is sometimes a cumbersome method of disposing of the case; for a juror may for conscientious or less worthy reasons, refuse to accede to the direction of the court.[85] In a few states this difficulty is avoided by

[81] See Allen *v.* Dundas, 3 T. R. 125, 131.

[82] In the second volume of Wilson's Reports, for example, there are about forty instances of this practice.

[83] See Bothwell *v.* Boston El. Ry. Co., 215 Mass. 467. As to criminal cases, see 4 ILL. L. REV. 200–01.

[84] Improvement Co. *v.* Munson, 14 Wall. (U. S.) 442; Pleasants *v.* Fant, 22 Wall. (U. S.) 116; Oscanyan *v.* Arms Co., 103 U. S. 261; Patton *v.* Texas, etc. Ry. Co., 179 U. S. 658. But if there is a real conflict in the evidence it is unconstitutional to withdraw the case from the jury. Baylies *v.* Travelers' Ins. Co., 113 U. S. 316. In many jurisdictions a verdict may be directed even for the party who has the burden of proof. Herbert *v.* Butler, 97 U. S. 319; Randall *v.* Baltimore & Ohio R. R. Co., 109 U. S. 478; Delaware, etc. R. R. Co. *v.* Converse, 139 U. S. 469. See 11 MICH. L. REV. 198. In 1757, Lord Mansfield directed a verdict for the plaintiff who had the burden of proof. Decker *v.* Pope, 1 Selwyn, Nisi Prius (13 ed.), 91.

[85] It has been said that jurors in a civil case refusing to render a verdict in accordance with the direction of the court may be punished for contempt. Cahill *v.* Chicago, etc. Ry. Co., 20 C. C. A. 184, 74 Fed. 285; BAC. ABR., tit. Juries, M (2). At common law in civil cases it came to be the view that where an attaint lies, the court cannot punish the jury for refusing to bring in a verdict in accordance with the direction of the court. THAYER, EVIDENCE, 165, 166. But this doctrine was established at a time when the jurors were entitled to act on their own knowledge. And of course in criminal cases where the court is held not to be empowered to direct a verdict of conviction, the jury cannot be punished for refusing to convict. Bushell's Case, Vaughan, 135, 6 How. St. Tr. 999; THAYER, EVIDENCE, 160–69.

the use of a very simple practice; when on the evidence there is no question of fact as to which reasonable men might differ, the court may dismiss the jury and enter a verdict without the formal concurrence of the jury. It would seem that this practice does not impair the right to trial by jury.[86]

7. *Compulsory nonsuit.* At common law nonsuits were wholly voluntary. The plaintiff might absent himself at the time of the rendition of the verdict, and in his absence no verdict could be rendered. The result was that the plaintiff would be nonsuited and the case would end. Inasmuch as the plaintiff was not thereby precluded from bringing a new suit, he was given a great opportunity to harass the defendant by bringing repeated actions against him and becoming nonsuit at the last moment before the jury has rendered its verdict.[87] Statutes have sometimes provided for compulsory nonsuit. A compulsory nonsuit differs from a directed verdict, in that there is not even a formal concurrence on the part of the jury. It differs also in that, like a voluntary nonsuit, it does not prejudice the plaintiff's right to bring a new action.[88] Although the compulsory nonsuit was unknown at the time of the adoption of our constitutions, it is nevertheless universally held not to impair the right to trial by jury.[89] It does not take away from the jury any question of disputed fact.

8. *Motion to strike out sham pleading.* If a party interposes a pleading which is clearly false in fact and which is interposed merely for the purpose of delay or vexation he has no right to go to the jury. Such a pleading is called a sham pleading. The opposite party may treat it as a nullity and enter judgment for

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[86] Van Ness *v.* Van Ness, Fed. Cas. No. 16, 869; Cahill *v.* Chicago, etc. Ry. Co. 20 C. C. A. 184, 74 Fed. 285; Cloquet Lumber Co. *v.* Burns, 124 C. C. A. 600, 207 Fed. 40; Curran *v.* Stein, 110 Ky. 99; Pardee *v.* Orvis, 103 Pa. 451. The *dictum* of Harlan, J., in Hodges *v.* Easton, 106 U. S. 408, to the opposite effect is, it is submitted, erroneous.

[87] The right has generally been somewhat cut down by statute. In England the plaintiff cannot become nonsuit or discontinue his action if a step has been taken after the defendant has filed his statement of defense. R. S. C., Order 26, rule 1. In this country very generally the plaintiff may become nonsuit at any time until the case is finally submitted to the jury.

[88] Mason *v.* Kansas City Belt Ry. Co., 226 Mo. 212, 26 L. R. A. (N. S.) 914.

[89] Coughran *v.* Bigelow, 164 U. S. 301; Naugatuck R. R. Co. *v.* Waterbury Button Co., 24 Conn. 468; Perley *v.* Little, 3 Me. 97; Munn *v.* Pittsburg, 40 Pa. 364.

himself, or he may apply to the court to strike it from the record.[90] In some jurisdictions it has been held, however, that to strike out as sham a negative pleading is to deny the right to trial by jury.[91] But this seems wrong. Although it is a rule of the common law that the general issue is not to be struck out as sham, because the defendant has a right to put the plaintiff to the proof of his claim in all cases, yet it would seem that the legislature has the power to change this rule. In a New Jersey case [92] the court says:

"If, therefore, the plea of the general issue is filed when the defendant has no defense, it tends only to illegal delay and comes within the definition of a sham plea. If it be said that if the general issue may be stricken out as a sham plea, or regarded by the plaintiff as a nullity, the defendant will be deprived of a trial by jury, the answer is that the practice in this country, as well as in England, of striking out false pleas, other than the general issue, whereby the defendant may be deprived of a trial, is well settled. It cannot be said that the party is deprived if he has nothing to try."

9. *Motion for judgment notwithstanding the verdict.* If the pleadings have raised an immaterial issue, and if the jury has brought in a verdict on that issue, it is clear that the court may arrest the judgment or enter judgment against the party who obtained the verdict; for since the issue is immaterial, the verdict is immaterial, and the court may give judgment on the pleadings. But suppose that the question arises not on the pleadings but on the evidence. Suppose that a motion is made at the trial for a compulsory nonsuit or the direction of a verdict, and that the court erroneously refuses to grant the motion and the verdict is rendered against the party who made the motion, what is the remedy? At common law the only remedy is a new trial.[93] But why should a new trial be given when the verdict could properly have been given only for the party who lost at the trial? In several juris-

[90] See 1 CHITTY, PLEADING (16 Am. ed.), *567; Phillips *v.* Bruce, 6 M. & Sel. 134; Merrington *v.* A'Becket, 3 D. & R. 231. A statute providing that the defendant must file an affidavit of defense as a condition precedent to trial by jury is constitutional. Fidelity, etc. Co. *v.* United States, 187 U. S. 315.

[91] Wayland *v.* Tysen, 45 N. Y. 281.

[92] Walter *v.* Walker, 35 N. J. L. 262.

[93] But see Skeate *v.* Slaters, 30 T. L. R. 290; Astley *v.* Garnett, 20 Brit. Col. R. 528; Dowagiac Mfg. Co. *v.* Schroeder, 108 Wis. 109; Muench *v.* Heinemann, 119 Wis. 441.

dictions statutes have provided that in such a case as this, the trial court or the appellate court may enter judgment in favor of the party for whom the verdict should have been rendered. Is this practice unconstitutional? The Supreme Court of the United States by a bare majority seems to think it is.[94] Their decision however has met with a great deal of criticism [95] and the state courts have reached the opposite result.[96] On principle the state courts seem clearly right. There is no valid objection to doing after the trial what admittedly might and should have been done at the trial. There is no encroachment upon the proper province of the jury.

10. *Evidence on appeal.* Frequently verdicts and judgments have to be set aside because of the failure to prove some fact at the trial which could have been proved by such clear and incontrovertible evidence that the court would have been justified on such evidence in giving a peremptory instruction to the jury on that point. At common law the practice was to grant a complete new trial. If there has to be a new trial, the new trial should be confined to the consideration of that point alone. But if the point is not one on which a jury could have any doubt, there should be no necessity for submitting it to a jury. The English Rules allow the Court of Appeal to receive "further evidence upon questions of fact, such evidence to be either by oral examination in court, by affidavit or by deposition taken before an examiner or commissioner." [97] The New Jersey Practice Act, 1912, provides that

"Upon appeal, or on application for a new trial, the court in which the appeal or application shall be pending may, in its discretion, take additional evidence by affidavit or deposition, or by reference; provided, that the error complained of is lack of proof of some matter capable of proof by record or other incontrovertible evidence, defective certifi-

[94] Slocum *v.* New York Life Ins. Co., 228 U. S. 364.

[95] Thorndike, "Trial by Jury in United States Courts," 26 HARV. L. REV. 732; Thayer, "Judicial Administration," 63 U. of PA. L. REV. 585; Rep. Amer. Bar Assoc., 1913, 561. But see Schofield, "New Trials and the Seventh Amendment," 8 ILL. L. REV. 287, 381, 465 (supporting the Slocum Case on the ground of the second clause of the amendment).

[96] Bothwell *v.* Boston El. Ry. Co., 215 Mass. 467; Kernan *v.* St. Paul City Ry. Co., 64 Minn. 312; Dalmas *v.* Kemble, 215 Pa. 410.

[97] Order 58, rule 4.

cation, or failure to lay the proper foundation for evidence which can, in fact, without involving some question for a jury, be shown to be competent." [98]

In this practice there is no violation of the constitutional guaranty of trial by jury; no question is withdrawn from the jury upon which the parties have a right to insist upon the opinion of the jury.

Is the constitutional guaranty of trial by jury an obstacle in the path of procedural reform? It does prevent the determination of questions of fact by less than twelve persons; but that difficulty is one which has been easily removed by an amendment to the constitution when it has been felt desirable, and it has been very generally felt desirable in the case of inferior courts. It does prevent a verdict in which the jurors do not all concur; but this difficulty, if it is a difficulty, is also easily done away with by constitutional amendments when it is felt desirable. It does prevent trial by manifestly partial or clearly incompetent jurors; but that is as it should be. It does prevent the encroachment by the court on the province of the jury, as it prevents the encroachment by the jury on the province of the court; but that is as it should be, provided always that trial by jury is worth preserving in civil cases. But — and this is the fundamental point which the writer has tried to develop — it does not prevent the use of any methods of effecting the division of functions of court and jury. The old methods of enforcing the division which were in use before our constitutions were adopted are clearly not unconstitutional. Nor does it violate our constitutions to supplement or supersede those methods by other methods more readily calculated to effect the division of functions without undue formality or delay. The constitutional guaranty does not stand in the way of the accomplishment of the result, much to be desired, that there shall be no trial by a jury when there is no disputable question of fact to be tried, and no new trial when there is no disputable question of fact

[98] Section 28. *Cf.* Kansas Code of Civil Procedure, § 580. See Rep. Amer. Bar Assoc., 1910, 645; Pound, "Some Principles of Procedural Reform," 4 ILL. L. REV. 338, 491, at page 505.

If a necessary allegation is omitted from a pleading, but the matter was actually litigated at the trial, it is proper for the trial court or the appellate court to allow an amendment to the pleading and to allow the verdict and judgment to stand. Slaughter *v.* Goldberg, Bowen & Co., 20 Cal. App. Dec. 89; Shuford *v.* Life Ins. Co., 167 N. C. 547; Chaffee *v.* Rutland R. R. Co., 71 Vt. 384.

left undetermined. If the ancient institution of trial by jury is to survive, as our ancestors intended that it should, it must be capable of adaptation to the needs of the present and of the future. This means that it must be something more than a bulwark against tyranny and corruption: it must be an efficient instrument in the administration of justice.

Austin Wakeman Scott.

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